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No. 1023

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

UNITED STATES OF AMERICA, PETITIONER

v.

HONORABLE MYRON L. GORDON, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF WISCONSIN

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

FRANKLYN M. GIMBEL
STANLEY P. GIMBEL
GERALD P. BOYLE

Attorneys for Respondent

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ARGUMENT

In its Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, the Government presented two questions to this Court:

(1) Whether, in the exceptional circumstances of this case, mandamus was an appropriate remedy for the Government regardless of the availability of an appeal.

(2) Whether the Court of Appeals was correct in determining that Respondent's decision dismissing the indictment against certain defendants was appealable to this Court.

Although Respondent shares the view expressed by the Court of Appeals for the Seventh Circuit that appeal to the Supreme Court would be available to the Government under 18 U.S.C. 3731, thereby answering question No. 2 presented by the Petitioners, Respondent is of the opinion that a denial of certiorari need not be based on that finding alone.

This Court extensively reviewed the law of mandamus in the decision of Will v. United States, 389 U.S. 90, 19 L. Ed. 2d 305, 88 S. Ct. 269 (1967), where Chief Justice Warren, speaking for the Court, said at Pp. 95 and 96:

> "The peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' Roche v. Evaporated Milk Assn., 319 U.S. 21, 26, 87 L. Ed. 1185, 1190, 63 S. Ct. 938 (1943). While the courts have never confined themselves to an arbitrary and technical definition of

> 'jurisdiction,' it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy. De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217, 89 L.Ed. 1566, 1572, 65 S.Ct. 1130 (1945). - Thus the writ has been invoked where unwarranted judicial action threatened 'to embarrass the executive arm of the Government in conducting foreign relations.' Ex parte Peru, 318 U.S. 578, 588, 87 L.Ed. 1014, 1020, 63 S.Ct. 793 (1943), where it was the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations.' Maryland v. Soper, 270 U.S. 9, 70 L.Ed. 449, 46 S.Ct. 185 (1926), where it was necessary to confine a lower court to the terms of an appellate tribunal's mandate, United States v. United States Dist. Court, 334 U.S. 258, 92 L.Ed. 1351, 68 S.Ct. 1035 (1948), and where a district judge displayed a persistent disregard of the Rules of Civil Procedure promulgated by this Court, La Buy v. Howes Leather Co., 352 U.S. 249, 1 L.Ed.2d 290, 77 S.Ct. 309 (1957); see McCullough v. Cosgrove, 309 U.S. 634, 84 L.Ed. 992, 60 S.Ct. 703 (1940); Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701, 706, 707, 71 L.Ed. 481, 484, 47 S.Ct. 286 (1927) (dictum)."

By the foregoing review, it clearly appears that the mandamus proceeding is not a vehicle by which this or lesser appellate courts can enunciate new principles of substantive law nor clarify established legal principles.

It rather appears that mandamus should only be employed against a Federal judge when his action is clearly unwarranted.

In this case, the Court of Appeals properly concluded that Judge Gordon's dismissal of the indictment was founded on the denial of a speedy trial, which surely is within his province as a trial judge to do when in the exercise of his discretion such action seems appropriate.

The implication of the first question presented to this Court in these proceedings by the Government seems to be that mandamus would be appropriate in this case even though an appeal from Judge Gordon's dismissal order was available. Respondent conversely urges that mandamus would be inappropriate even if the Government had no right to appeal.

Looking again to Will v. United States, 389 U.S. 90, 96-97, which involved a Government challenge to a trial court's order concerning the provision of a bill of particulars, this Court said:

> "Nor is the case against permitting the writ to be used as a substitute for interlocutory appeal 'made less compelling ... by the fact that the Government has no later right to appeal.' Dibella v. United States, 369 U.S. 121, 130, 7 L. Ed. 2d 614, 620, 82 S. Ct. 654 (1962)." See footnote number 5 (emphasis added).

Petitioner, contrary to the conclusion reached by the Court of Appeals, asserts that Judge Gordon's dismissal was upon a set of facts anticipated but not yet known. As brief comment to that assertion, Respondent points out the highly significant and unique factor in the underlying case to this proceeding of the defendants' imprisonment on June 9, 1969, for a sentence theretofore imposed upon their conviction in a Wisconsin court for state crimes charged upon the incidents constituting

the basis of the Federal charges against them. Thus, Judge Gordon was of the opinion that the defendants would be denied their Constitutional right to a speedy trial if their Federal trial were not held when called on June 9, 1969. See Smith v. Hooey, 393 U.S. 374, 378, 21 L.Ed. 607, 89 S.Ct. 575 (1969); see also Annotation, "Accused's Right to Speedy Trial under Federal Constitution - Supreme Court Cases," 21 L.Ed. 2d 905.

In the conclusion section of the Government's petition in this matter, it is alleged that this case presents substantial questions in the area of balancing the protection of the rights of defendants who are the subject of adverse publicity with the right of the people to call upon them in a court of law to answer for their acts. On that statement of this case alone, mandamus is surely an inappropriate procedural vehicle for appellate court expression.

A litigant, not a court, must chart the course of his litigation. The Government, in this case, inappropriately selected mandamus as a way for appellate review. In the process, Respondent, a trial judge, is made the object of challenge and criticism rather than the rule of law of a case with which the Government disagrees. Such a result reaffirms the wisdom of this Court in narrowly defining the circumstances by which the writ of mandamus will be employed. This case is not one within those circumstances.

CONCLUSION

Mandamus is not a substitute for appeal whether a right to appeal exists or not. If 18 U.S.C. 3731 has meaning, the Court of Appeals for the Seventh Circuit found it to apply in the underlying case to this proceeding. Respondent, a United States trial judge, had discretion to dismiss a criminal action upon his finding a Constitutional infirmity in the proceedings. For the

reasons set forth hereinabove, it is respectfully urged that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

FRANKLYN M. GIMBEL
Attorney for Respondent

Of Counsel:

Stanley P. Gimbel
Gerald P. Boyle